IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.58 OF 2004

Suresh Dondu Mahajan ...Petitioner

Versus

The State of Maharashtra ...Respondent

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Mr.P.S.Dani for Petitioner.

Mr.K.V.Saste, A.P.P. for Respondent.

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CORAM: A.M.KHANWILKAR, J.

APRIL 7, 2005.

P.C.

1. Heard Counsel for the parties.

2. Rule. Rule made returnable forthwith, by consent. Mr.Saste, A.P.P. waives notice for Respondent.

3. As short question is involved, Petition is taken up for final disposal forthwith, by consent.

4. The only issue that arises for consideration in the present Petition is whether the Judicial Magistrate was justified in allowing the Application preferred by the prosecution recalling witness Nos.15 and 17, in exercise of powers under Section 311 of the Criminal Procedure Code.

5. There can be no dispute that powers under Section 311 of the Code, ought to be exercised by the concerned Court for a just decision. However, in the present case, it is seen that the recording of evidence of the concerned witnesses was completed on 21st November 2003. Thereafter, statement of the accused under Section 313 of the Code came to be recorded on 18th December 2003, wherein, the accused has admitted documents at Exhibits 20 and 21. It is thereafter, the prosecution preferred Application Exhibit 23-D for recall of witness Nos.15 and 17. The relevant averments made in the Application reads thus :

"When the evidence of the prosecution was

> closed these documents i.e. Exh.20, Exh.21 & Exh.22 were not part of evidence and now when those documents have become part of evidence, the evidence of wit.No.15 - who conveyed the admission of the injured into the hospital she P.S.O. writs.No. 17 has because necessary for just decision of the case. "

. The Court below has allowed that Application on the following reasoning :

> "Initially, when he had early completed the evidence of the prosecution after examining two witness and after admitting P.M. notes and the accident report form, the evidence at that stage was sufficient according to him. But, after the argument of APP was over Ld.Counsel for the accused admitted the two documents and because of that for better opportunities and for bringing more clarity in the evidence and for just decision of the case evidence of the witnesses in necessary. Relying on the decision given in the cited cases above, I think that the application is liable to be granted and the evidence of two witnesses is quite necessary for the just decision of the case."

6. It is obvious that the reason for permitting recall of witness Nos.15 and 17 has nothing to do with the two documents admitted by the accused during the course of recording of statement under Section 313 of the Code. The reason recorded that, to bring more clarity in the

evidence and for just decision of the case, evidence of concerned witnesses is necessary, clearly overlooks that power under Section 311 of the Code ought not to be invoked to enable the prosecution to fill-in the lacuna in the prosecution case. The concerned witnesses were examined by the prosecution. The fact that extrajudicial confession was made, was a substantive evidence, which ought to have been brought on record in the course of recording of evidence. That fact has nothing to do with the two documents which have been admitted by the accused.

7. In my opinion, therefore, the order of permitting recall of witness Nos.15 and 17 as passed by the Judicial Magistrate dated December 18, 2003 deserves to be set-aside.

8. Accordingly, this Petition succeeds. Impugned order is set-aside. Trial to proceed on its own merits, in accordance with law.

A.M.KHANWILKAR, J.